SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY, PETITIONER,

28.

JESS G. READ, INSURANCE COMMISSIONER FOR THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 2663

GREAT NORTHERN LIFE INSURANCE COMPANY, a corporation, Appellant,

VB.

JESS G. READ, Insurance Commissioner for State of Oklahoma, Appellee

STATEMENT OF POINTS TO BE RELIED UPON—Filed Dec. 14,

Comes now the above named appellant, Great Northern Life Insurance Company, and states that the points upon which it intends to rely in this court in this case are as follows:

- 1. The objection that this is a suit against the state could not properly be raised by the appellee for the first time on the trial date.
- 2. A suit against a state officer acting under an unconstitutional statute is not a suit against the state in violation of the Eleventh Amendment to the Constitution of the United States.
- 3. Chapter Ia, Title 36, Sessions Laws of Oklahoma of 1942 (House Bill 353 of the 18th Legislature), which levies an annual tax of 4% upon the gross premiums collected in Oklahoma by foreign life insurance companies is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this appellant of the equal protection of the law.
- 4. Said act is unconstitutional for the further reason that the tax levied thereby is diverted to uses and purposes not authorized by the Constitution and laws of Oklahoma and not in a manner authorized by the Constitution and laws of Oklahoma.
- 5. The 4% tax rate levied by said act applies only to [fol. 2] premiums collected after April 25, 1941, its effective

date, and not to all premiums collected during the year 1941, and as applied to all premiums collected during the year 1941, the same is unconstitutional and a violation of due process of law.

Henry S. Griffing, John A. Johnson, Attorneys for Appellant.

A copy of the foregoing Statement of Points to be Relied Upon was served upon Fred Hansen as attorney for Appellee by mail on the tenth day of December, 1942.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

DESIGNATION OF ENTIRE RECORD TO BE PRINTED—Filed Dec. 21, 1942

Great Northern Life Insurance Company, the appellant, through its attorneys of record, hereby designates the entire certified typewritten transcript of the record for printing herein, including the following:

- 1. The Complaint, including exhibit.
- 2. The Summons and Return.
- 3. Answer of Defendant.
- 4. Transcript of proceedings at Pre-Trial Hearing.
- 5. Supplement to Complaint.
- 6. Answer to Supplement to Complaint.
- 7. Stipulation of Facts, including exhibits.
- 8. Journal Entry of Judgment by Honorable Lucius Babcock with Motion for its introduction, objection by the Plaintiff and ruling by the Court thereon.
 - 9. Findings of Fact by the Court.
 - 10. Direction for Entry of Judgment.
 - 11. Conclusions of Law by the Court.
 - 12. Decree of the Court.
 - 13. Notice of 'Appeal.
 - 14. Cost Bond.

[fol. 3] 15. Designation of entire record and proceedings for inclusion in the record on appeal.

16. Designation of entire record and proceedings for printing.

Dated this 18th day of December, 1942.

Great Northern Life Insurance Company, by Henry S. Griffing, John A. Johnson, Its Attorneys.

Jess G. Read, appellee herein, through his attorneys of record, acknowledges receipt of a copy of the foregoing Designation of the Entire Record to be Printed herein on this 18th day of December, 1942.

Mac Q. Williamson, by J. B., Attorney General of the State of Oklahoma; Fred Hansen, by J. B., Assistant Attorney General of the State of Oklahoma,

Attorneys for Appellee.

[File endorsement omitted.]

[Caption omitted]

[fol. 4] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

GREAT NORTHERN LIFE INSURANCE COMPANY, a corporation, Plaintiff.

JESS G. READ, Insurance Commissioner for State of Oklahoma, Defendant

COMPLAINT-Filed March 28, 1942

1

Plaintiff is a corporation incorporated under the laws of the State of Wisconsin, but having a permit to do business under the laws of the State of Oklahoma, and defendant is a citizen of the State of Oklahoma. This action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and cost, the sum of Three Thousand (\$3000.00) Dollars.

Plaintiff was licensed to do business in the State of Oklahoma on December 5, 1922, under a charter authorizing it to make and grant non-participating contracts of insurance upon the lives of individuals, and on December 28, 1922, it was authorized by the State of Oklahoma to solicit and provide policies of Health and Disability insurance. For each year since said dates, plaintiff has continued in business in the State of Oklahoma and has annually paid its license fee of Three Hundred (\$300.00) Dollars. Plaintiff has paid to the defendant, Jess G. Read, as Insurance Commissioner of the State of Oklahoma, Three Hundred (\$300.00) Dollars as its license fee to do business in Oklahoma for the year [fol. 5] 1942, and now is and was at all times hereinafter mentioned a person within the jurisdiction of the State of Oklahoma.

3

In the conduct of its business of soliciting and writing policies of insurance, plaintiff has obtained contracts of insurance with approximately six thousand policyholders within Oklahoma and has employed and trained forty-five agents throughout the various counties of the state. It has gathered and filed a large and valuable quantity of factual and medical information concerning its policyholders and has built up a large and profitable business which is not subject to lease or sale to other persons. Its property is devoted to a limited use by the plaintiff, and is not susceptible to use by other persons. Plaintiff is threatened with deprivation of this property and investment by the collection under duress by the defendant, as Insurance Commissioner of Oklahoma, of certain taxes levied under color of certain laws of the State of Oklahoma, hereinafter more specifically indicated.

4

Under the provisions of Sections 1 and 2, Article XIX of the Constitution of Oklahoma and Section 10478, Oklahoma Statutes of 1931 and Chapter Ia, Title 36, Session Laws of Oklahoma of 1941, being House Bill 353 of the Eighteenth Legislature of Oklahoma, an annual tax of 4% has been levied upon all premiums collected in Oklahoma by every foreign insurance company, including this plaintiff. By coercion and duress, defendant has collected this tax from the plaintiff for the year 1942, in addition to the annual

license fee of Three Hundred (\$300.00) Dollars. As required by the Oklahoma laws challenged herein, plaintiff paid said tax in the amount of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars involuntarily and under protest and for the purpose of avoiding the burdensome penalties threatened to be imposed and to prevent cancellation of the right of the plaintiff to continue in business within the State of Oklahoma. Payment under protest was made on the 28th day of February, 1942, and was accompanied by a formal protest served upon defendant and Carl B. Sebring, State Treasurer of the State of Oklahoma, a true copy of which formal protest is marked [fol. 6] Exhibit "A," attached hereto and incorporated herein.

5

Domestic insurance companies incorporated in and existing under the laws of the State of Oklahoma have been at all times and are now authorized by charter to solicit and write contracts of insurance identical with those made and granted by the plaintiff, and such domestic life insurance companies obtain and write such contracts of insurance in a manner identical with that of the plaintiff. No premium tax is levied upon or collected from such domestic corporations by the provisions indicated in Paragraph 4 herein, and life insurance companies incorporated in the State of . Oklahoma are not required to bear the onerous tax burden imposed upon plaintiff under color of the provisions indicated in Paragraph 4. Plaintiff therefore says that the gross premium tax of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars involuntarily paid is unconstitutional, illegal, excessive and void for the reason that Section 10478, Oklahoma Statutes 1931 and Chapter Ia, Title 36, Session Laws of Oklahoma, 1941, being House Bill 353 of the Eighteen-Legislature of Oklahoma, and Sections 1 and 2 of Article XIX of the Oklahoma Constitution are unconstitutional and in contravention of the Fourteenth Amendment to the Constitution of the United States, Section 1, in attempting to impose taxes exclusively upon the plaintiff after it was duly admitted to the State of Oklahoma, and not upon domestic insurance corporations doing the identical type and kind of business within the State of Oklahoma. Plaintiff says that such Acts and such State Constitutional sections, in attempting to levy an arbitrary and discriminatory tax upon the plaintiff while it was a

person within the jurisdiction of the State of Oklahoma, possessed of property, investment, and business which it had built up since 1922, and while plaintiff was entitled to the equal protection of the laws, seek to deprive the plaintiff of its rights under the Fourteenth Amendment of the Federal Constitution. Plaintiff says that the acts of the defendant as Insurance Commissioner of Oklahoma in enforcing said revenue measures by receiving and collecting the taxes on the gross premiums of the plaintiff is in contravention of the Fourteenth Amendment to the Constitu-[fol. 7] tion of the United States. All of the statutes and the state Constitutional provisions indicated and action of the defendant deny to the plaintiff the equal protection of the laws.

6

The foregoing taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma by Section 1, Chapter Ia, House Bill 353, Session Laws of Oklahoma 1941, Page 121, and said Act, are each unconstitutional and void for the further reason that the premium taxes are diverted by the said Act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma.

7

The illegality of the tax herein arises by reason of action of the defendant from which the laws provide no appeal. Wherefore, plaintiff prays:

- (1). That it have judgment against the defendant in the sum of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars.
- (2). In the alternative, if for any reason the court should find that plaintiff is not entitled to such judgment, plaintiff prays that your Honorable Court will enter a decree in the nature of mandamus, commanding defendant to deliver to plaintiff, or cause to be repaid to it, the sum of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars.
- (3). That plaintiff have such other and further relief as is just.

Henry S. Griffing, John A. Johnson, Attorneys for Plaintiff, 2701 First National Bldg.

EXHIBIT "A" TO COMPLAINT

Protest of Great Northern Infe Insurance Company

To Jess G. Read, Insurance Commissioner of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

To Carl S. Sebring, State Treasurer of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

GENTLEMEN:

[fol. 8]

You and each of you are hereby notified that Great Northern Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and having its principal place of business at Milwaukee, the State of Wisconsin, does herewith pay to the said Insurance Commissioner of the State of Oklahoma the sum of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars, demanded by said Insurance Commissioner, said sum being the amount of tax alleged to be assessed and levied against the undersigned under and by virtue of Section 10478, Oklahoma Statutes 1931 and Chapter Ia, Title 36, Session Laws of Oklahoma, 1941, otherwise known as House Bill 353, enacted by the Eighteenth Legislature, approved April 25, 1941, on all premiums collected in the State of Oklahoma by the undersigned within the twelve months next preceding the first day of January, 1942; said sum so paid being four per cent (4%) of such premiums, less deductions allowed by law.

That the amount of such tax upon said premiums collected by the undersigned in said state during the period beginning January 1, 1941 and ending April 25, 1941, the date of the approval of said act, is the sum of One Thousand Three Hundred Ten and 34/100 (\$1,310.34) Dollars; that the amount of such tax upon such premiums collected by the undersigned in said state during the period beginning April 25, 1941 and ending December 31, 1941, was and in the sum of Six Thousand Eight Hundred Eighty-seven and 197/100 (\$6,887.97) Dollars.

That said payment includes the following amounts which

your protestant alleges are unconstitutional, illegal, excessive and void, to-wit:

That said tax in the sum of Eight Thousand One Hundred. Ninety-eight and 31/100 (\$8,198.31) Dollars, being the ag-[fol. 9] gregate of the aforesaid sums paid under protest. so alleged to be unconstitutional, illegal, excessive and void, is paid involuntarily, under duress and compulsion and under protest and only in response to the demand of said Insurance Commissioner; that said tax so paid under protest is unconstitutional, illegal, excessive and void for the reason and upon the grounds that said Act of April 25. 1941, does not impose said taxes upon this protestant and said Act should not be construed as imposing such taxes on this protestant; that said Act is a revenue measure. and the taxes sought to be imposed thereby are soughtto be imposed exclusively upon protestant and other foreign insurance companies doing business in the State of Oklahoma, and not upon domestic insurance companies doing business within the State of Oklahoma; that such Act attempts to levy an arbitrary and discriminatory tax upon protestant after it was duly admitted to the State of Oklahoma and while it was and is a quasi citizen thereof, a person within its jurisdiction and entitled to the equal protection of the laws; that by reason of the foregoing and other substantial grounds, said legislative acts purporting to assess said taxes and the acts of said Insurance Commissioner in demanding, receiving and collecting said taxes are each in contravention of the Constitution and laws of the United State- of America, in that the same constitute and are a taking of the property of the undersigned without due process of law, as prohibited by the Fifth and Fourteenth Amendments to the Constitution of the United States of America and as prohibited by the Constitution of the State of Oklahoma, and constitute and are a denial to the undersigned of the equal protection of the laws, as prohibited by the Fourteenth Amendment to the Constitution of the United States of America and the provisions of the Constitution of the State of Oklahoma; that in paying said tax under protest, the undersigned relies upon and expressly invokes the protection of all the applicable provisions of the Constitution and laws of the State of Oklahome and the Constitution and laws of the United States

of America, including (but not excluding others) the Fifth and Fourteenth Amendments to the Constitution of the United States of America, prohibiting the taking of property without due process of law and prohibiting the denial to any person of the equal protection of the laws.

[fol. 10] You and each of you are hereby further notified that said tax so paid under protest, in the sum of Eight Thousand One Hundred Ninety-eight and 31/100 (\$8,198.31)-Dollars, is unconstitutional, illegal, excessive and void and that said Insurance Commissioner is without power, authority or jurisdiction to assess, levy or collect the same, and that said tax is paid involuntarily and under protest for the purpose of avoiding burdensome penalties threatened to be imposed and to prevent the cancellation of the license of protestant to transact business within the state. Demand is hereby made that said sum so paid under protest, to-wit: The sum of Eight Thousand One Hundred Ninety-eight and 31/100 (\$8,198.31) Dollars, be repaid and refunded to the undersigned protestant.

You and each of you are further notified that said taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma under and by virtue of Section 1, Chapter I-a, House Bill 353, Session Laws Oklahoma 1941, page 121, and said act, are each and all unconstitutional and void for the further reason that such premium taxes are diverted by said act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma, and all of which is expressly prohibited by Article XIX of the Constitution of the State of Oklahoma.

You and each of you are further notified that unless said sum so paid under protest is repaid that protestant will, at the time and in the manner provided by law, institute suit for the recovery of the same, or take other appropriate action to protest its legal rights, and that you and each of you shall segregate said fund and hold the same in a separate account and not pay the same into the State Treasury of this State for a period of thirty days from this date, and that if suit be filed within such period, that such fund so segregated shall be further held pending the outcome of said suit, all as provided by law.

This protest is executed in duplicate this 28th day of February, 1942.

Great Northern Life Insurance Company, by Henry S. Griffing, Its Attorney.

[fol. 11]

Receipt

Receipt of duplicate original of the protest, of which the within and foregoing is a full, true and correct copy is hereby acknowledged at the time of the payment of the tax therein mentioned.

Jess G. Read, Insurance Commissioner of the State of Oklahoma, by Andy Crosby, Jr., C. B. Sebring, State Treasurer of the State of Oklahoma.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SUMMONS AND RETURN

To the above named Defendant:

You are hereby summoned and required to serve upon John A. Johnson, plaintiff's attorney, whose address 2701 First National Building, Oklahoma City, Oklahoma, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Theodore M. Filson, Clerk of Court, by Margaret P. Blair, Deputy Clerk. (Seal of Court.)

Date: March 28, 1942.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 28th day of March, 1942, I received the within summons at Oklahoma City, Oklahoma, and executed the same by leaving a true copy of the summons, together with copy of complaint, for Jess G. Read, Insurance Commissioner of the State of Oklahoma, with Andy Crosby, Jr., Assistant Insurance Commissioner, of the State of Oklahoma, at Oklahoma City, [fol. 12] Oklahoma, this 28th day of March, 1942, the Chief Office not found in this district.

Marshal's Fees

Travel Service

2.00

Dave E. Hilles, United States Marshal, by Jasper Saunkeah, Deputy United States Marshal.

Returnable not later than 20 days after service. Filed March 31, 1942.

Theodore M. Filson, Clerk, by Margaret P. Blair, Deputy.

IN UNITED STATES DISTRICT COURT

Answer-Filed August 19, 1942

Comes Now the above defendant and in answer to the complaint filed herein, alleges and states:

- (1) The court lacks jurisdiction because plaintiff has brought a cause of action, identical to this cause of action, against defendant in the District Court of Oklahoma County, Oklahoma, which cause of action is still pending.
- (2) The complaint fails to state a claim against defendant upon which relief can be granted.
- (3) The court lacks jurisdiction because said complaint seeks, in the alternative, a decree in the nature of mandamus against defendant.
- (4) Defendant denies all material allegations of fact set forth in the complaint, except such allegations as are hereinafter specifically admitted.
- (5) Defendant admits the allegations contained in paragraph 1 of the complaint.
- (6) Defendant admits the allegations contained in paragraph 2 of the complaint which state that plaintiff was licensed to do business in the State of Oklahoma on Decem-

ber 5, 1922, under a (Wisconsin) charter authorizing it to make and grant non-participating contracts of insurance [fol. 13] upon the lives of individuals, and that on December 8, 1922, it was authorized by the State of Oklahoma tosolicit and provide policies of health and disability insurance in said State, and alleges that plaintiff was so licensed and authorized for the license year ending February 28, 1923. Defendant also admits and alleges that plaintiff has been so licensed and authorized for each license year thereafter, same being a period beginning March 1 of each calendar year and ending on February 28 of the succeeding calendar year. Defendant further admits and alleges that plaintiff has paid to defendant the sum of \$300.00 as an "entrance fee" for each of said license years and, at the conclusion thereof, also paid to defendant a tax of two per centum, or four per centum, as required by law, on all premiums collected by it in this State during the preceding calendar year, less proper deductions, for the privilege of having been so licensed and authorized during said license year, and that at all times during each of said license years' plaintiff has been, and is now, a "person within the jurisdiction of the State of Oklahoma."

- (7) Defendant admits the allegations of paragraph 3 of the complaint which relate to the conduct of its business, the gathering and filing of information concerning its policyholders, and the building up and nature of its business and the limited use thereof, but denies that plaintiff is threatened with the deprivation of its said property by reason of the collection of the tax sought to be recovered by plaintiff in this action, and alleges that said taxes were and are validly levied and collected, and that same were not collected by, or paid to, defendant under duress.
- (8) Defendant admits the allegations of paragraph 4 of the complaint which state that the 4% premium tax involved in this case was levied under the provisions of Sections 1 and 2, Article 19, of the Constitution of Oklahoma, and Chapter Ia, Title 36, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), but denies that said tax was levied under the provisions of Section 10478, O. S. 1931, and also denies that said tax for the current license year, to-wit: a period beginning March 1, 1941, and ending February 28, 1942, was illegally levied or collected under "coercion and duress." Defendant admits, however, that when plaintiff paid the

[fol. 14] \$8,198.31 of premium taxes sought to be recovered here, same was accompanied by the notice of protest attached as Exhibit "A" to its complaint.

- (9) Defendant admits the allegations of paragraph 5 of the complaint which state that under the laws of Oklahoma, domestic life insurance companies authorized to write contracts of insurance identical with those of plaintiff are not required to pay a premium tax thereon, but denies that by reason thereof Section 10478, O. S. 1931, Chapter Ia, Title 36 Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), and Sections 1 and 2, Article 19, of the Constitution of Oklahoma, contravene the 14th Amendment of the Constitution of the United States, and also denies that defendant, in collecting the tax sought to be recovered here, did so in contravention of said Amendment.
 - (10) Defendant denies the allegations of paragraph 6 of the complaint which state that premium taxes imposed upon premiums collected by foreign incurance companies in Oklahoma by Section 1, Chapter 1a, Title 36, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), are unconstitutional and void for the reason that said taxes are diverted by said Act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized thereby, and alleges that said taxes are not diverted to any use or purpose not authorized by the Constitution and laws of Oklahoma.

Wherefore, premises considered, defendant respectfully asks the court to deny plaintiff the relief prayed for in its complaint, and to render judgment in favor of defendant and against plaintiff, and for all costs of this suit.

Mac Q. Williamson, Attorney General, Fred Hansen, Assistant Attorney General, Andy Crosby, Jr.,

Attorneys for Defendant.

(Verification omitted.)

[fol. 15] Service of a copy of the above Answer is hereby acknowledged and consent given to file same out of time. Dated this 20th day of August, 1942.

John A. Johnson.

Consent given to file out of time. Dated this 19 day of August, 1942.

Edgar S. Vaught, Judge,

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Pretrial Conference and Hearing at Oklahoma City, Oklahoma, on September 15, 1942, Before Honorable Bower Broaddus, Judge

APPEARANCES: John A. Johnson, Esq., appearing for the Plaintiff; Fred Hanson, Esq., Assistant Attorney General, appearing for the Defendant.

RECORDED PROCEEDINGS

The Court: If you will take your Petition, I think we

can agree on substantially all the allegations.

Mr. Hanson: If the court please, could I make one suggestion? Counsel, Mr. Johnson, desires to amend his Petition, which is satisfactory to us, to bring up some angles that he has not presented in his original complaint.

The Court: Do you have your amendment ready?

Mr. Johnson: No, sir; we have just recently discussed

that feature; I don't have it ready yet, your honor.

The Court: We will go by the complaint and when we get through we will take that up. I will allow the amendment but in order to keep some regularity so you will know what I am talking about, let's follow the original complaint, and I will permit the amendment to include certain additional allegations.

Mr. Hanson: Yes, sir.

[fol. 16] The Court: The first paragraph is on the question of jurisdiction. Is diversity of citizenship admitted? Do you admit that this court acquired jurisdiction on diversity of citizenship, and that there is more than \$3,000.00 involved?

Mr. Hanson: We admit that there is \$3,000.00 involved, but he doesn't plead diversity of citizenship.

The Court: He wouldn't have to under the pleadings.

The Court: It is asserted that there is a similar action pending in the State Court. Do you think that would affect the jurisdiction of this court?

Mr. Hanson: If the court please, that case has been dismissed, and I presume that ground would be removed, whether or not it would affect it.

The Court: All right. The allegation as to the licersing on December 5, 1922 to grant non-participating contracts of insurance has been admitted by your pleadings?

Mr. Hanson: Yes, sir.

The Court: On December 28, 1922, he was authorized to solicit and provide for health and disability insurance you admit that.

Mr. Hanson: Yes, sir.

The Court: Since the original date of December 5th the company has been in business and has paid all license fees, you admit that.

Mr. Hanson: We admit that.

The Court: You also admit the number of policyholders in paragraph 31

Mr. Hanson: Correct.

The Court: 45 agents, and they have obtained a great deal of information and built up a profitable business, you admit that?

Mr, Hanson: We admit that.

The Court: You deny, though, that the taxing laws are depriving them of profit?

[fol. 17] Mr. Hanson: Yes, sir.

The Court: That is the question of law in this case, and the only one?

Mr. Hanson: Yes, sir.

The Court: You admit the tax of four per cent was imposed under the statute?

Mr. Hanson: Yes, sir.

The Court: Here is an allegation that you paid it under coercion and duress, you paid it under protest. Wouldn't that be sufficient under the statute?

Mr. Hanson: He paid it under protest and notice of, written notice of protest, which notice we admit, and which

is attached to his Petition.

The Court: He wouldn't have to pay it under coercion

and duress, would he, under the law?

Mr. Hanson: No, sir, he could pay it under protest and he could sue to recover within 30 days, and they did file suit within 30 days.

The Court: Then, we are not concerned with the coercion and duress at all. That will be the theory of the case from now on, and he is confined to it and you are confined to it too.

Mr. Hanson; Yes, sir.

The Court: They allege as to domestic insurance companies similar tax was not imposed. Is that admitted?

Mr. Hanson: That is admitted.

The Court: The sixth paragraph, that it is unconstitutional and void. That is a mere conclusion. You allege in your answer lack of jurisdiction because it seeks a mandamus. I don't think that relief would require a mandamus in this case, would it?

Mr. Hanson: In his prayer he asks to recover, and if

not, that writ of mandamus issue.

The Court: I have no authority to issue a mandamus.

Mr. Johnson: We admit that, so we seek only relief. [fol. 18] The Court: You have purely questions of law in this case under those admissions.

Mr. Johnson: Yes, sir.

Mr. Hanson: Your Honor, I talked with counsel, and he has some proof that he would want to put on, and I would want to put on a little proof as to administrative interpretation and practice. We can stipulate that and file a short stipulation and cover all of the evidence which either of us desire.

The Court: You file your briefs. Let's see, I will set this down for trial. Evidently, you don't both understand what the other insists upon.

Mr. Hanson: Yes, sir, we tried it once in the State Court. The Court: How about trying this case on Wednesday, October 14th?

Mr. Hanson: That is satisfactory with the State.

The Court: I will permit you to orally argue it at that, time.

Mr. Hanson: Yes, sir.

The Court: Can you file briefs in 10 days?

Mr. Johnson: Yes, sir. I would like, however, to now ask your Honor for permission to file an Amended Petition.

The Court: Let's get the briefs out of the way. Can, you file one in 10 days?

Mr. Johnson: Yes, sir.

The Court: That will make it the 25th. Can you reply to it in 10 days?

Mr. Hanson: Yes, sir.

The Court: Let me have it before this case comes on, and all we will have to do then is to have the argument on that day. Now, we will take up the amendment.

Mr. Johnson: The complaint, your Honor, seeks a recovery for money paid on the ground that the tax law is [fel. 19] unconstitutional. It came into effect April 25th, 1941, or approximately four months after the year in which the company began to do business.

The Court: You want to amend so you can recover for

that year?

Mr. Johnson: Two per cent for four months. The Court: Is there any dispute about that? Mr. Hanson: Only as to the law, your Honor.

The Court: It is agreed as to the date when the Act became effective, and that they had paid up to that time. Is the Act retroactive?

Mr. Hanson: It is our view that it is.

The Court: That is another question to brief.

Mr. Hanson: Yes, sir. The Court: What is next? Mr. Johnson: That is all.

The Court: You may file a Supplement to be regarded as a part of your Petition setting that up, as short and as concise as possible, and it will be considered filed as of today and the Answer of the Insurance Commissioner will be considered as filed as of today again in answer to that.

Mr. Hanson: It would be necessary for me to amend my

answer.

The Court: I will give him until tomorrow to make his amendment, and give you five days thereafter to file a supplement of the same nature. Just answer that part of it.

The Court: The Reporter is allowed \$1.00 for reporting and \$5.50 for transcripts, including a copy to each side, or a total of \$6.50, and each side will pay him half thereof, or \$3.25. The court requests that you file your stipulation in 10 days.

Endorsed: Filed in District Court on September 21, 1942.

IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO COMPLAINT-Filed Sept. 16, 1942

House Bill 353 is not an entrance fee nor a regulatory measure enacted by virtue of the police power of Oklahoma. but, as a revenue-producing measure enacted to provide funds for the operation of state government, it is a tax on the business of plaintiff, collected on and for the business

done during the preceding year.

Between January 1, 1941, and the effective date of said Act, at which time the gross premium tax was raised from 2% to 4%, plaintiff collected gross premiums of Sixty-five Thousand Five Hundred Sixteen and 58/100 (\$65,516.58). Dollars, upon which defendant collected the full 4%, thus

giving said Act a retrospective application.

If the court should rule that House Bill 353 is constitutional, defendant has illegally, unconstitutionally and retrospectively applied said Act, and has, without due process of law collected from the plaintiff One Thousand Three Hundred Ten and 34/100 (\$1,310.34) Dollars, which sum is the excessive 2% on premiums collected from January 1, 1941 to April 24, 1941, and plaintiff is entitled to judgment for the said One Thousand Three Hundred Ten and 34/100 (\$1,310.34) Dollars.

Wherefore, if House Bill 353 be held not to deny plaintiff the equal protection of the laws, plaintiff prays judgment for One Thousand Three Hundred Ten and 34/100 (\$1,310.34) Dollars by reason of the application of said

Act.

Henry S. Griffing, John A. Johnson, Attorneys for Plaintiff, 2701 First National Building, Oklahoma City, Oklahoma.

Service of the above has been made by mailing a copy [fol. 21] thereof to Fred Hansen, Assistant Attorney General, attorney for the defendant.

Dated this 16th day of September, 1942.

John A. Johnson.

[File endorsement omitted,]

IN UNITED STATES DISTRICT COURT

Answer to Supplement to Complaint.—Filed Sept. 18, 1942

Comes Now the above defendant and in answer to the "Supplement to Complaint" filed herein, alleges and states:

(1) Defendant denies all material allegations of fact set forth in said supplement, except such allegations as are hereinafter specifically alleged or admitted.

- (2) Defendant denies all material allegations of fact set forth in the first paragraph of said supplement, and alleges that House Bill No. 353, referred to therein (Chapter 1a, Title 36, Oklahoma Session Laws 1941), effective April 25, 1941, is a part of the laws of the State of Oklahoma regulating foreign insurance companies doing business in Oklahoma; that same was enacted under and by virtue of the police powers of said State, and that the premium tax mentioned therein is a fee or tax charged foreign insurance companies desiring to enter Oklahoma and to do business therein for any license year for the right or privilege of entering Oklahoma and doing business therein during said year.
- (3) Defendant admits the material allegations of fact set forth in the second paragraph of said supplement, but denies the legal conclusion contained therein.
- (4) Defendant admits the material allegations of fact set forth in the third paragraph of said supplement which, in effect, state that a 2% tax on the \$65,516.58 of premiums collected by plaintiff in Oklahoma between January 1, 1941 and April 25, 1941, is \$1,310.34, but denies that defendant has illegally or without due process of law collected said \$1,310.34.

Wherefore, premises considered, defendant respectfully asks the court to deny plaintiff the relief prayed for in its [fol. 22] "Supplement to Complaint," and to render judgment in favor of defendant and against plaintiff, and for all costs of this suit.

Mac Q. Williamson, Attorney General, Fred Hansen, Assistant Attorney General, Andy Crosby, Jr., Attorneys for Defendant.

Service of the above "Answer to Supplement to Complaint" has been made by mailing a copy thereof to Henry S. Griffing and John A. Johnson, Attorneys, 2701 First National Building, Oklahoma City, Oklahoma.

Dated this 17 day of September, 1942.

Fred Hansen, Assistant Attorney General.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS.—Filed Sept. 30, 1942

It is stipulated and agreed by and between the parties hereto, as follows:

- (1) That the sum of \$8,189.32, paid by plaintiff to defendant under protest, has been held by defendant separate and apart from the General Revenue Fund of the State Treasury of Oklahoma, as provided in Section 12665, O. S. 1931, and that said sum will not be deposited in said fund unless and until there is a final adjudication in favor of defendant and against plaintiff, but that if plaintiff obtains a final adjudication in its favor, the amount found by the court to be due plaintiff will be paid to it, as provided in said section.
- (2) That domestic life, health and accident insurance companies competing in Oklahoma with plaintiff do not pay any kind or type of taxes to said State which are not likewise paid by plaintiff, except that said competing domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately only 1/20th of the amount of four per [fol. 23] cent tax would bring on the premiums collected by said companies in this State, less proper deductions.
- (3) That during the period beginning November 16, 1907, and ending December 31, 1941, the total receipt of the Oklahoma Insurance Department from the two per cent tax on gross premiums of foreign insurance companies, and from the annual entrance and agents' fees of such companies, aggregate \$25,585,107.34, while the expenses of said department during said period aggregate \$910,107.34, said expenses being approximately 3.55% of said total receipts, and that since December 31, 1941, said expenses are approximately only 2% of the gross receipts thereof.
- (4) That under the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires for the first time to do business in Oklahoma, it is required, among other things, to file an application for a license therefore, same to expire the succeeding last day of February (see true and correct copy of such an application attached hereto as "Exhibit

A"), and on or before said date, to pay a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it is so licensed and prior to the succeeding first day of January; and that under the uniform administrative interpretation by said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated said tax as being paid for the right or privilege of entering Oklahoma and doing business therein to and including said last day of February, and a license issued by him to said company (see true and correct copy of such a license attached hereto as Exhibit "B") as expiring by operation of law and its express terms on said date. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

(5) That under the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a [fol. 24] foreign insurance company holding a license to do business in Oklahoma during any license year (same being from March I to and including the succeeding last day of February), desires to do business therein during the ensuing license year, it is required, among other things, (a) to file, on or before the last day of February of the current license year, an application for a license therefor (see true and correct copy of such an application attached hereto as "Exhibit A"), (b) as a condition precedent, to have paid a tax of two per centum (since April 25, 1941-four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, and (c) on or before the last day of February of said succeeding license year, to pay a similar tax on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year; and that under the uniform administrative interpretation of said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated the tax first above mentioned as having been paid for the right or privilege of having been permitted to enter Oklahoma and do business therein during the then current license year, the tax last above mentioned as being paid for the right or privilege of having been permitted to enter Oklahoma, do business therein during said ensuing license year, and a license issued by him to said company (see true and correct copy of such a license attached hereto as "Exhibit B"), as expiring by operation of law and its express terms at the end of said license year. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

(6) That under the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, the annual four per cent tax on premiums, referred to in said section, has been levied and collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the twelve months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies in this state after [fol. 25] said date. It is understood that plaintiff does not agree to the correctness of the above administrative practice.

In Witness Whereof the above parties have hereunto set their hands and seals on this the 25th day of September, 1942.

> Great Northern Life Insurance Company, by Henry S. Griffing, John A. Johnson, Attorneys for Plaintiff; Jess G. Read, by Mac Q. Williamson, Attorney General, Fred Hansen, Assistant Att'y General, Andy Crosby, Jr., Attorneys for Defendant.

EXHIBIT "A" TO STIPULATION OF FACTS

Agreement and Application for License

The John Doe Life Insurance Company of New York City, in the State of New York, hereby applies for License in the State of Oklahoma for the year and agrees, under the signature of its President and Secretary, hereto attached, and the corporate seal of the said Company, that after receiving authority so to do from the Insurance Department of the State of Oklahoma, it will transact the business of Life Insurance only, in the State of Oklahoma, in accordance with the provisions of the laws of said State, and will pay all such Taxes and Fees as may at any time be

imposed by law or act of the legislature, upon Insurance Companies engaged in the business herein enumerated.

In Witness Whereof, We have hereunto subscribed our names and affixed the corporate seal of the Company, this 28th day of February, 1942.

Joe Doe, President, Richard Doe, Secretary. (Seal.)

[fol. 26] EXHIBIT "B" TO STIPULATION OF FACTS

(Insurance Department, State of Oklahoma)

License No. 1270, State of Oklahoma, Insurance Department

Whereas, the John Doe Life Insurance Company, a corporation, organized under the laws of the State of New York, and located at New York City, having complied with such of the requirements of the Insurance laws of Oklahoma, as are applicable to the said corporation, in order to enable it to transact business herein, now, therefore,

I, Jess G. Read, Insurance Commissioner, do hereby license and authorize the said John Doe Life Insurance Company subject to all requirements and conditions of the laws, to transact the business, of Life Insurance, in the State of Oklahoma, from March 1, 1942, to the last day of February, 1943.

In Witness Whereof, I have hereunto set my hand and caused the seal of my office to be affixed at the City of Oklahoma, in the State of Oklahoma, this first day of March, A. D. 1942.

Jess G. Read, Insurance Commissioner. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT—Filed October 14, 1942

The court makes the following findings of fact:

(1) That the plaintiff, "Great Northern Life Insurance Company, a corporation," is a foreign insurance corporation, organized, existing and doing a life insurance business under the laws of the State of Wisconsin, and is duly licensed and admitted to transact a life, health and disability insurance business in the State of Oklahoma during the license year beginning March 1, 1942 and ending February 28, 1943, and has been so licensed and admitted each and every license year since December 5, 1922; that the Jess G. Reed, referred to in the defendant "Jess G. Read, as In-[fol. 27] surance Commissioner of the State of Oklahoma," is the duly elected, qualified and acting Insurance Commissioner of the State of Oklahoma, and has been such Commissioner since January 17, 1924.

- (2) That plaintiff, at all times hereinafter mentioned, had the personnel and contracts of insurance and conducted and owned the business and property set forth in paragraph 3 of its "Complaint."
- (3) That plaintiff, on February 28, 1942, acting under and pursuant to the provisions of Section 12665, Oklahoma .Statutes 1931, relating to the payment under protest of taxes claimed by taxpayers to be illegal, paid under protest to defendant the sum of \$8,198.31, as a 4% tax upon all premiums, less proper deductions (to-wit: on premiums aggregating \$204,957.75), collected by plaintiff in Oklahoma during the calendar year beginning January 1, 1941 and ending December 31, 1941, as provided in Section 1 and the third paragraph of Section 2. Article 19 of the Constitution of Oklahoma, and Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), and at the same time paid defendant the entrance and agents fees referred to in the first and second paragraphs of Section 2 of said Article 19, and in Section 1, Chapter 1a, Title 36, cupra.
- (4) That prior to April 25, 1941, the effective date of said Chapter 1a, Title 36, the laws of Oklahoma required the payment of a 2% tax on the premiums, less proper deductions, collected by foreign insurance companies in said state, which tax was raised to 4% by said section; that of said \$204,957.75 of premiums collected in Oklahoma by plaintiff during the calendar year of 1941, \$65,516.68 was collected during the period beginning January 1, 1941 and ending April 24, 1941, the 4% premium tax thereon being \$2,620.66 (one-half of said sum or \$1,310.34 is sued for in plaintiff's "Supplement to Complaint"), while the remain-

der of said premiums, to-wit: \$139,441.17, was collected during the period beginning April 25, 1941 and ending December 31, 1941, the 4% premium tax thereon being \$5,577.64.

- (5) That, as stated in paragraph 1 of the Stipulation of Facts herein, said sum of \$8,189.32, paid by plaintiff to defendant under protest, as aforesaid, has been held by defol. 28] fendant separate and apart from the General Revenue Fund of the State Treasury of Oklahoma, as provided in Section 12665, Oklahoma Statutes 1931 (to-wit: as provided in Sections 5418 and 5419, Oklahoma Statutes 1931, same being 62 O. S. 1941 §§ 74-75, in defendant's protest fund or account in the State Treasury), and said sum will not be deposited in said General Revenue Fund unless and until there is a final adjudication in favor of defendant and against plaintiff, but if plaintiff obtains a final adjudication in its favor, the amount found by the court to be due plaintiff will be paid to it, as provided in said section.
- (6) That, as stated in paragraph 2 of the Stipulation of Facts herein, domestic life, health and accident insurance companies competing in Oklahoma with plaintiff, do not pay any kind or type of taxes to said State which are not likewise paid by plaintiff, except that said competing domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately only 1/20th of the amount a 4% tax would bring on the premiums collected by said companies in this State, less proper deductions.
- (7) That, as stated in paragraph 3 of the Stipulation of Facts herein, during the period beginning November 16, 1907, and ending December 3f, 1941, the total receipts of the Oklahoma Insurance Department from the 2% tax on gross premiums of foreign insurance companies, and from the annual entrance and agents fees of such companies, aggregated \$25,585,107.34, while the expenses of said department during said period aggregated \$910,107.34, said expenses being approximately 3.55% of said total receipts, and since December 31, 1941, said expenses are approximately only 2% of the gross receipts thereof.
- (8) That, as stated in paragraph 4 of the Stipulation of Facts herein, under the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a

foreign insurance company desires for the first time to do business in Oklahoma, it is required, among other things, to file an application for a license therefor, same to expire the succeeding last day of February (a true and correct copy of such an application is attached to said stipulation as "Exhibit A"), and, on or before said date, to pay a tax [fol. 29] of two per centum (since April 25, 1941-four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it is so licensed and prior to the succeeding first day of January; and under the uniform administrative interpretation by said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated said tax as being paid for the right or privilege of entering Oklahoma and doing business. therein to and including said last day of February, and a license issued by him to said company (a true and correct copy of such a license is attached to said stipulation as "Exhibit B") as expiring by operation of law and its express terms on said date. ·

(9) That, as stated in paragraph 5 of the Stipulation of Facts herein, under the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company holding a license to do business in Oklahoma during any license year (same being from March 1 to and including the succeeding last day of February) desires to do business therein during the ensuing license year, it is required, among other things, (a) to file, on or before the last day of February of the current license year, an application for a license therefor (a true and correct copy of such an application is attached to said stipulation as "Exhibit A"), (b) as a condition precedent to have paid a tax of two per centum (since April 25, 1941-four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, and (c) on or before the last day of February of said succeeding license year, to pay a similar tax on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, and under the uniform administrative interpretation of said Commissioner of the insurance laws of Oklahoma since said effective date, he has

considered and treated the tax first above mentioned as having been paid for the right or privilege of having been permitted to enter Oklahoma and do business therein during the then current license year, the tax last above mentioned as being paid for the right or privilege of having been per[fol. 30] mitted to enter Oklahoma and do business therein during said ensuing license year, and a license issued by him to said company (a true and correct copy of such a license is attached to said stipulation as "Exhibit B") as expiring by operation of law and its express terms at the end of said license year.

- of Facts herein, under the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, the annual 4% tax on premiums, referred to in said section, has been levied and collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the twelve months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies in this State after said date.
 - (14) That it is not alleged in the cause of action set forth in plaintiff's "Supplement to Complaint" that same arises under the Fourteenth Amendment of the Constitution of the United States or under any other provision of said Constitution, and said supplement shows that the amount in controversy therein is less than \$3,000.00, exclusive of interests and costs, being for only \$1,310.34.

Dated this 14th day of October, 1942.

Bower Broaddus, United States District Judge.

OK: John A. Johnson, Henry S. Griffing, Attorneys for Plaintiff; Mac Q. Williamson, Attorney General; Fred Hansen, Assistant Attorney General; Andy Crosby, Jr., Attorneys for defendant.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

Conclusions of Law-Filed October 14, 1942

The court makes the following conclusions of law:

- (1) That this is a suit of a civil nature between a citizen of the State of Wisconsin and, in effect if not in name, the State of Oklahoma; that while said state by the provisions of Section 12665, Oklahoma Statutes 1931, waived its immunity from being sued in its own courts to recover taxes paid under protest, it did not waive its immunity under the Eleventh Amendment of the Constitution of the United States from being so sued in Federal Courts, and hence this court does not have jurisdiction over the subject matter of this suit or of defendant.
- (2) That even though the State of Oklahoma by the provisions of Section 12665, Oklahoma Statutes 1931, waived its immunity under the Eleventh Amendment of the Constitution of the United States from being sued in Federal Courts to recover taxes paid under protest (which the court denies), there is no diversity of citizenship between plaintiff and defendant, and while the matter in controversy in plaintiff's "Complaint" exceeds \$3,000.00, exclusive of interests and costs, it does not arise under the Constitution or laws of the United States, and hence this court does not have jurisdiction over the subject matter of the cause of action set forth in said "Complaint."
- (3) That it is not alleged in the cause of action set forth in plaintiff's "Supplement to Complaint" that same arises under the Fourteenth Amendment of the Constitution of the United States or under any other provision of said Constitution, and said supplement shows that the amount in controversy therein is less than \$3,000.00, exclusive of interest and costs, being for only \$1,310.34, and hence this court does not have jurisdiction over the subject matter of the cause of action set forth in said "Supplement to Complaint."
- (4) That even if this court has jurisdiction of this action (which the court denies), neither the "Complaint" or the "Supplement to Complaint" filed by plaintiff herein, nor the pleadings and/or evidence in this case, state or show, [fol. 32] respectively, for the reasons hereinafter set forth, a claim against defendant upon which relief can be granted.

- (5) That neither Sections 1 or 2, Article 19 of the Constitution of Oklahoma, or Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), nor the construction or application thereof by the Insurance Commissioner of Oklahoma, referred to in plaintiff's "Complaint" and "Supplement to Complaint," violate the Fourteenth Amendment of the Constitution of the United States or any provision of said Constitution or of the Constitution of Oklahoma.
- 6. That when a foreign insurance companies desires, for the first time, to enter Oklahoma and to do business therein, it is required, among other things, to file an application for a license to enter Oklahoma and do business therein to and including the succeeding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so entering Oklahoma and doing business therein to and including said last day of February, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date.
- (7) That when such a licensed company desires to enter Oklahoma and do business therein during the ensuing license year (March 1 to and including the succeeding last day of February,) it is required, among other things, to file an application on or before the last day of February of the current year for a license to enter Oklahoma and do. business therein during said ensuing license year, and, as a condition precedent; to show payment of a tax of two per centum (since April 25, 1941-four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the right or privilege of having been permitted to enter Oklahoma and to do business therein during [fol. 33] the then current license year, and to pay on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do busi-

ness therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms at the end of said year.

- (8) That the fact the premium tax law involved here, both before and after it was amended on April 25, 1941, to increase from 2% to 4% the tax on premiums, less proper deductions, collected by foreign insurance companies in the State of Oklahoma:
- (a) discriminated heavily (as shown in the 6th paragraph of the "Findings of Fact" herein) against foreign insurance companies in favor of competing domestic insurance companies, and
- (b) resulted in the collection of premium taxes greatly exceeding (as shown by the 7th paragraph of the "Findings of Fact" herein) the expenses of operating the Oklahoma Insurance Department;

did and does not make said law, either before or after said amendment, unconstitutional or invalid under the Fourteenth Amendment of the Constitution of the United States or under any provision of said Constitution or of the State of Oklahoma, since said premium taxes were and are annually paid by foreign insurance companies for the right or privilege of entering Oklahoma and doing business therein during the year for which same are paid, and since the payment thereof is a condition precedent for the securing of a license to enter Oklahoma and do business therein during the ensuing license year, all as is more fully shown by paragraphs six and seven hereof.

- (9) That the annual four per cent tax on premiums referred to in Section 1, Chapter 1a, Title 36, page 121, Okla-[fol. 34] homa Session Laws 1941 (36 O. S. 1941 § 104), is levied and should be collected, as provided in said section, on all premiums received by licensed foreign insurance companies in Oklahoma, less proper deductions, "within the twelve months next preceding the first day of January," 1942, and that this is true even though said Act did not go into effect until April 25, 1941.
- (10) That on the facts found by the court, plaintiff is not entitled to the relief prayed for in either its "Com-

plaint" or "Supplement to Complaint," or to any part thereof.

Dated this 14th day of October, 1942.

Bower Broaddus, United States District Judge.

OK: John A. Johnson, Henry S. Griffing, Attorneys for Plaintiff; Mac Q. Williamson, Attorney General; Fred Hansen, Assistant Attorney General; Andy Crosby, Jr., Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Decree-Filed October 14, 1942

This cause came on to be heard at this term on October 14, 1942, and evidence was offered, and the case was argued by counsel; and thereupon, upon consideration thereof:

It Is Ordered, Adjudged and Decreed that judgment be rendered for defendant and against plaintiff, that defendant go hence without day, that defendant recover its costs [fol. 35] from plaintiff, and that plaintiff's "Complaint" and "Supplement to Complaint" be dismissed.

Dated this 14th day of October, 1942.

Bower Broaddus, United States District Judge.

OK: John A. Johnson, Henry S. Griffing, Attorneys for Plaintiff. Mac Q. Williamson, Attorney General; Fred Hansen, Assistant Attorney General; Andy Crosby, Jr., Attorneys for Defendant.

[File endorsement omitted.].

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL-Filed Nov. 4, 1942

To: Mac Q. Williamson, Attorney General of the State of Oklahoma and Fred Hansen, Assistant Attorney General of the State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, Attorneys for the Defendant, Jess G. Read, Insurance Commissioner of the State of Oklahoma.

· Notice is hereby given that Great Northern Life Insurance Company, the above named plaintiff, hereby appeals

to the Circuit Court of Appeals for the Tenth Circuit from the final Judgment and Decree, in its entirety, entered in

this action on the 14th day of October, 1942.

Henry S. Griffing, Attorney for Appellant, Great Northern Life Insurance Company, a corporation. John A. Johnson, Attorney for Appellant, Great Northern Life Insurance Company, a corporation. Address: 2701 First National Bldg., Oklahoma City, Okla.

[fol. 36] A copy of the above Notice was mailed to Mac Q. Williamson, Attorney General of the State of Oklahoma, and to Fred Hansen, Assistant Attorney General of the State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, attorneys for the Defendant, Jess G. Read, Insurance Commissioner of the State of Oklahoma, on the 4th day of November, 1942.

Grace B. Davis, Deputy Clerk of the United States District Court for the Western District of Okla-

homa.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTE RE APPEAL BOND

[An appeal bond in the sum of \$250.00, with appellant as principal and National Surety Corporation as surety, was filed November 4, 1942.]

IN UNITED STATES DISTRICT COURTS

DESIGNATION OF THE ENTIRE RECORD AND PROCEEDINGS FOR INCLUSION IN THE RECORD ON APPEAL—Filed November 5, 1942

Great Northern Life Insurance Company, the appellant, through its attorneys of record, hereby designates the entire record and proceedings herein for inclusion in the record on appeal including the following:

- 1. The Complaint, including exhibit.
- 2. The Summons and Return.

3. Answer of Defendant.

4. Transcript of proceedings at Pre-Trial Hearing.

5. Supplement to Complaint.

- 6. Answer to Supplement to Complaint.
- 7. Stipulation of Facts, including exhibits.

8. Findings of Fact by the Court.

- 9. Conclusions of Law by the Court.
- 10. Direction for Entry of Judgment.

[fol. 37] 11. Decree of the Court.

12. Notice of Appeal.

13. Cost Bond.

14. Designation of entire record and proceedings for inclusion in the record on appeal.

Dated this 5th day of November, 1942.

Great Northern Life Insurance Co., by Henry S. Griffing, John A. Johnson, Its Attorneys.

Jess G. Read, defendant and appellee herein, through his attorneys of record, acknowledges receipt of a copy of the foregoing designation of the records to be included in the record on appeal this 5 day of November. 1942.

Mac Q. Williamson, Attorney General of the State of Oklahoma; Fred Hansen, Assistant Attorney General of the State of Oklahoma, Attorneys for

Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Proceedings of Oct. 14, 1942.

Now on this 14th day of October, 1942, the above matter comes on for hearing before Hon. Bower Broaddus, Judge.

APPEARANCES: Mr. John Allen Johnson for the plaintiff. Mr. Fred Hansen, Assistant Attorney General for the defendant.

Colloguy

. Mr. Hansen: I desire to introduce in the record of this case a copy of a decision of the Honorable Lucius Babcock,

Judge of the District Court of Oklahoma County, Oklahoma, [fol. 38] dated September 8, 1942 in the case of Lincoln National Life Insurance Company versus Jess G. Read, Insurance Commissioner of Oklahoma, et al., No. 105488 in said court, said copy to be introduced for the sole purpose of identifying the same as being a true and correct copy of said decision and in order that same may be considered by this court and by any court to which this case may be appealed as the decision of the District Court of Oklahoma County, Oklahoma, in said case.

In this connection, it is stipulated by the parties hereto that the first and third causes of action of said case involved issues substantially the same, respectively, as those involved in plaintiff's complaint and supplement to complaint, and that said copy is a true and correct copy of said decision.

The Court: I take it that decision holds. Of course, it does not pass on the question of jurisdiction in this case because the state court would have jurisdiction, but it does hold I take it, from your introducing it, that the tax is a condition to the right to do business?

Mr. Hansen: Yes, sir, and it is for that reason I wanted to get this in the record here, so I could properly identify it and argue it as being an authority, and if the case is appealed it would be in the record, so there would be no question of its identity; so I would have the right to use it as an authority on any brief on appeal.

The Court: Under the ruling of the United States Supreme Court following the Erie Railroad Company case, while I don't think it is binding as to any Federal constitutional provision, but the mere fact they hold we are bound by the state court's decision, I would be required to take judicial notice of any decision, but it is quite proper to have it made a part of the record.

Mr. Johnson: I object to its introduction on several grounds, one of which is that this is a matter governed by the Federal constitution, and under the decision in the Eric Railroad case a decision of a state court would have no binding effect. Another objection is that the District Court of Oklahoma County, Oklahoma, is not a court whose decisions are printed and cited; whose decisions are not in a [fol. 39] form which may be readily obtainable, and the only opinion of the Supreme Court on the matter holds, or the

opinion refers to inferior courts whose decisions are printed

and published.

Series Series

The Court: That opinion was not based upon that. There is no recital of any kind supporting your contention, in that opinion. The Supreme Court of the United States held, I believe it was in an Ohio case, holding Ohio decisions would be controlling. They didn't say it was printed., I will permit it to be made part of the record.

Mr. Johnson: I would add one more thing, if it is to be made a part of the record and considered. Your Honor has practiced in the courts of Oklahoma for many years, and therefore well knows that orders and judgments of district courts in the State of Oklahoma are not prepared by the district judges but are prepared by the attorneys and signed by the courts. This decision being introduced was prepared by Mr. Hansen, for whatever effect that may have upon the ruling of the court.

The Court: I know this: in any court the judge requires quite often that the attorneys prepare orders and findings of fact. I do in this court, but I examine them and quite often change them, but when I sign them they are mine. It may be admitted. Is that all the record you care to make?

Mr. Hansen: Yes, sir.

The Court: Do you care to make any additional record? Mr. Johnson: No, your honor.

Endorsed: Filed in District Court on Dec. 3, 1942.

DEFENDANT'S EXHIBIT "A"

In the District Court of the State of Oklahoma, in and for Oklahoma County. The Lincoln National Life Insurance Company, a corporation, Plaintiff, vs. Jess G. Read, The Insurance Commissioner of the State of Oklahoma; and Carl B. Sebring, State Treasurer of the State of Oklahoma, Defendants. No. 105,488

[fol. 40] Journal Entry

Now on this the 8th day of September, 1942, the above cause came on for hearing upon defendants' denurrer to the second amended petition of plaintiff, both parties being present by their respective attorneys of record; and the Court having examined the pleadings and having heard the argument of counsel, asked both parties to file briefs, and took the case under advisement.

Now on this 11th day of September, 1942, said briefs having been filed and considered, this cause same on for decision upon said demurrer, the parties appearing, as aforesaid, and the court being fully advised in the premises, and in consideration thereof, finds that neither Section 2. Article 19 of the Constitution of Oklahoma, Section 10478. Oklahoma Statutes 1931, or House Bill No. 353 of the 18th Oklahoma Legislature (Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941), nor the construction or application thereof by the Insurance Commissioner of Oklahoma referred to in plaintiff's second amended petition. violate the 14th Amendment of the Constitution of the United States or the Constitution of Oklahoma, and that neither said petition nor the 1st, 2nd or 3rd causes of action thereof state facts sufficient to constitute a cause of action in favor of plaintiff and against defendants, or either of them, and that hence defendants' demurrer to said petition. and to each of its said causes of action should be sustained.

The court further finds, in relation to said first cause of action, that under the pertinent constitutional and statutory provisions of this State, as construed in the case of New York Life Insurance Company v. Board of Commissioners of Oklahoma County, 155 Okla. 247, 9 Pac. (2d) 636, and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice:

(a) when a foreign insurance company desires, for the first time, to enter Oklahoma and to do business therein, [fol. 41] it is required, among other things, to file an application for a license to enter Oklahoma and do business therein to and including the succeeding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so entering Oklahoma and doing business therein to and including said last day of February, and

that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date, and

(b) when such a licensed company desires to enter Oklahome and do business therein during the ensuing license year (March 1 to and including the succeeding last day of February), it is required, among other things, to file on or before the last day of February of the current license year. an application for a license to enter Oklahoma and do business therein during said ensuing license year, and, as a condition precedent, to show payment of a tax of two per centum (since April 25, 1941-four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year, and to pay on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do business therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms at the end of said year.

The court also finds, in relation to said second cause of action, that under the pertinent constitutional and statutory provisions of this state and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Okla-[fol. 42] homa, said administrative practice being a matter of common knowledge of which the court will take judicial notice, the words "after all cancellations are deducted" as used in Section 2, Article 19 of the Constitution of Oklahoma, and the words "after all cancellations and dividends to policyholders are deducted" as used in Section 10478, Oklahoma Statutes 1931, and Section 1, Chapter 1a Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surrender values paid by licensed foreign life insurance companies in this State to their Oklahoma policyholders.

The court further finds, in relation to said third cause, of action, that under the express provisions of Section 1,

Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, and the uniform administrative practice of the State Insurance Commission since April 25, 1941, the effective date of said Act, said administrative practice being a matter of common knowledge of which the court will take judicial notice, the annual four per cent tac on premiums referred to in said section is levied and should be collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the twelve months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies after said date.

It Is Therefore Ordered, Adjudged and Decreed by the Court that defendants' demurrer to plaintiff's second amended petition in the above cause be and the same is hereby sustained, to which findings and order plaintiff excepted, which exceptions are duly allowed. Thereupon plaintiff announced in open court its intention to stand upon its said petition and to refuse to plead further.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the above case be dismissed at the cost of plaintiff, to which ruling and judgment of the court plaintiff excepted, and its exceptions are duly allowed.

Thereupon, in open court, plaintiff gave notice of its intention to appeal to the Supreme Court of the State of Oklahoma, and upon application of plaintiff and for good cause shown, it is ordered and adjudged by the court that plaintiff [fol. 43] be granted 30 days' time in addition to the time allowed by law to make and serve case-made appeal to the Supreme Court of Oklahoma in said cause, defendants to have three (3) days thereafter in which to suggest amendments, the case-made to be signed and settled upon three (3) days' notice by either party.

Lucius Babcock, District Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 44] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

ORDER OF SUBMISSION-March 17; 1943

Third Day, March Term, Wednesday, March 17th, A. D. 1943. Before Honorable Orie L. Phillips, Honorable Sam

G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard and was argued by counsel, John A. Johnson, Esquire, appearing for appellant, Fred Hansen, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS OPINION—May 7, 1943.

John A. Johnson (Henry S. Griffing was with him on the brief) for appellant,

· Fred Hansen, Asst. Atty. Gen. of Oklahoma (Mac Q. Williamson, Atty. Gen. of Oklahoma, was with him on the brief) for appellee.

Before Phillips, Bratton, and Huxman, Circuit Judges

PHILLIPS, Circuit Judge, delivered the opinion of the court:

Great Northern Life Insurance Company is a corporation organized under the laws of Wisconsin. It is authorized to issue policies of life, health, and disability insurance. In December, 1922, the Insurance Commissioner of Oklahoma issued to it a certificate of authority to transact business in Oklahoma and regularly thereafter issued like certificates to it for the years 1923 to 1942, inclusive. Each of such certificates by its terms expired on the last day of February next after its issue.

Sec. 1 of Art. XIX of the Oklahoma Constitution provides that no foreign insurance company shall be granted a license or be permitted to do business in Oklahoma "until it shall have complied with the laws of" Oklahoma and "shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insur-[fol. 45] ance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

Sec. 2 of Art. XIX of the Oklahoma Constitution provides that until otherwise provided by law, each foreign life insurance company doing business in Oklahoma shall pay to the Insurance Commissioner an entrance fee of \$200 per annum; and until otherwise provided by law, an annual tax of two per cent on all premiums collected in the state, and a tax of \$3 on each local agent.

Ch. 21, Art. I, \$22, O. S. L., 1909, \$10478, O. S. 1931, provided that every foreign insurance company doing business in Oklahoma should; on or before the last day of February in each year, report to the Insurance Commissioner the total amount of gross premiums received by it in the state during the preceding year and pay to the Insurance Commissioner an entrance fee as provided in Art. XIX of the Oklahoma Constitution, an annual tax of two per cent on all premiums collected in the state, and an annual tax of \$3 on each local agent, and that any company "failing" to make such returns and payments promptly and correctly" should forfeit and pay to the Insurance Commissioner, in addition to the amount of such taxes, the sum of \$500, and that any company so failing for sixty days should thereafter be debarred from transacting any business in the state until such taxes and penalties had been fully paid. Sec. 10478, supra, was amended by \$1, Ch. 1a, Tit. 36, p. 121, O. S. L., 1941, (36 O. S. 1941, \$104). The amended Act became effective April 25, 1941. It increased the annual gross premiums tax from two per cent to four per cent.

Ch. 21, Art. I, §21, O. S. L., 1909, 36 O. S. 1941, §56, provides that the Insurance Commissioner, in December of each year, shall furnish to each insurance company authorized to do business in Oklahoma, two or more blanks in form adapted for its annual statement, and that each of such insurance companies shall annually, on or before the last day of February, file in the office of the Insurance Commissioner a statement which shall exhibit its financial condition on the thirty-first day of December of the previous year and its business of that year, and that if the Insurance Commissioner finds that all laws applicable to a company have been fully complied with, and the facts warrant, he [fol. 46] shall issue to such company a license or certificate of authority, subject to all requirements and conditions of law, to transact business in the state, and that such certificate shall expire on the last day of February next after its issue.

It has been the uniform administrative practice of the Insurance Commissioner, since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires for the first time to do business in Oklahoma, to require it, among other things, to file an appli-

¹ Ch. 21, O. S. L., 1909.

cation for a license to expire on the last day of February next after its issue, and, on or before such date, to pay the gross premiums tax imposed by law on all premiums, less proper deductions, received by it in Oklahoma from the date of issue of its license to and including the thirty-first day of December next; and when a foreign insurance company holding a license to do business in Oklahoma during any license year desires to do business therein during the ensuing license year, to require it, among other things, (a) to file, on or before the last day of February of the current license year, an application for a license for the ensuing year, (b) to pay the gross premiums tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year, as a condition precedent to the issuance of the license for the ensuing year, and (c) to pay, on or before the last day of February of the ensuing license year, the gross premiums tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year; and since the effective day of such Act the Insurance Commissioner has uniformly interpreted such Act as providing for a license to expire on the last day of February next after its issue; and in issuing renewal licenses has uniformly construed it as requiring the payment, on or before the last day of February in each year, of the gross premiums tax for the right or privilege of entering Oklahoma and doing business therein during the license year expiring on that date.

Licenses issued to foreign insurance companies, by their express terms, expire on the last day of February next after

their issue,

[fol. 47] No gross premiums tax is exacted from domestic

insurance companies in Oklahoma.

On February 28, 1942, the Insurance Company paid under protest the gross premiums tax required by 36 O. S. 1941, \$104, being four per cent of the gross premiums collected by it, less proper deductions, for the calendar year ending December 31, 1941. It brought this action to recover such tax. From an adverse judgment, the Insurance Company has appealed.

. It is a well-settled rule that a state, subject to the paramount authority of the Federal Constitution, may withhold

Noble v. Mitchell, 164 U. S. 367, 370, 371;
 Hooper v. California, 155 U. S. 648, 655, 656;
 Power Mfg. Co. v. Saunders, 274 U. S. 490, 496, 497.

from a foreign corporation the privilege of doing business within its boundaries, or may grant such privilege on such conditions as it deems fit.³ The general rule is subject to the well-settled qualification that a state may not impose conditions which require the surrender of rights guaranteed by the Federal Constitution.⁴

The power of a state to exact a gross premiums tax from a foreign insurance company for the privilege of doing

business in a state is well settled.5

[fol. 48] It is not an essential of a privilege tax that it be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege, depending on which system the legislature chooses to adopt.

Williams v. Standard Oil Co. of La., 278 U. S. 235, 240;
Hanover Fire Ins Co. v. Harding, 272 U. S. 494, 507;
Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 10 Cir., 100 F. 2d 770, 774;
20 C. J. S., \$1810, p. 30;

Id., §1811, p. 32;

Note, 49 A. L. R., p. 727.

Williams v. Standard Oil Co. of La., 278 U. S. 235, 241; Terral v. Burke Construction Co., 257 U. S. 529, 532;

Hanover Fire Insurance Co. v. Harding, 272 U. S. 494, 507;

Washington v. Superior Court of Washington, 289 U. S. 361, 365.

Philadelphia Fire Association v. New York, 119 U. S. 110, 119;

Pittsburgh Life & Trust Co. v. Young, 172 N. C. 470, 90 S. E. 568, 570, 571;

Massachusetts Bonding & Ins. Co. v. Chorn, 274 Mo. 15, 201 S. W. 1122, 1123-1125;

Equitable Life Assur. Soc. of United States v. Pennsylvania, 238 U. S. 143;

Commonwealth v. Equitable Life Assur. Soc. of United States, 239 Pa. 288, 86 A. 787;

State v. Continental Assur. Co., 176 Tenn. 1, 137 S. W. 2d 277;

Continental Assur. Co. v. Tennessee, 311 U. S. 5.

⁶ Carpenter v. Peoples Mutual Life Ins. Co., — Cal. —, 74 P. 2d 508, 510;

William A. Slater Mills v. Gilpatric, 97 Conn. 521, 117 A. 806, 808.

In the case of New York Life Ins. Co. v. Board of County Commissioners of Oklahoma County, 155 Okl. 249, 9 P. 2d 936, 938, 939, 944, the Supreme Court of Oklahoma held that the gross premiums tax was not a tax in a constitutional sense, but was a license fee or privilege tax for the privilege of doing business in the state.

It is clear, under the Oklahoma statutes, that the license of a foreign insurance company expires on the last day of February next after its issue. Art. XIX of the Oklahoma Constitution and the Oklahoma statutes, hereinabove referred to, permit of the construction that the payment of the gross premiums tax on or before the expiration of the. license year on the last day of February is exacted for the privilege of doing business in the state during that license year and as a condition precedent to the issuance of a license for the ensuing year. Such has been the uniform and longcontinued construction of the executive department charged with the administration of the statutes. The long-continued construction of a statute by a department of the government charged with its execution is entitled to great weight and should not be overturned without cogent reasons.7 The Legislature of Oklahoma has convened many times during this period of administrative construction without expressing its disapproval. That silence may be regarded as acquiescence in or approval of the administrative construction." Similar statutory provisions have been so construed. [fol. 49] The Insurance Company's license which was issued in 1940 expired February 28, 1941. March 1, 1941, to

Globe Indemnity Co. v. Bruce, 10 Cir., 81 F. 2d 143, 152, certiorari denied 297 U. S. 716;

City of Tulsa v. Southwestern Bell Tele. Co., 10 Cir., 75 F. 2d 343, 349, certiorari denied 295 U. S. 744;

United States v. Jackson, 280 U. S. 183, 193;

Federal Land Bank v. Warner, 292 U. S. 53, 55.

^{*}Skelton v. United States, 10 Cir., 88 F. 2d 599, 604; Commissioner v. McKinney, 10 Cir., 87 F. 2d 811, 815;

United States v. Midwest Oil Co., 236 U. S. 459, 474; Morrissey v. Commissioner, 296 U. S. 344, 355.

Pacific Mutual Life Ins. Co. y. Hobbs, 152 Kan. 230, 103 P. 2d 854, 856, 857:

Sovereign Camp, W.O.W. v. Casados, D.C.N.M., 21 F. Supp. 989.

February 28, 1942, constituted a new license year and a new admission into the state. It was within the power of the state to change the conditions of admission at any time as to future license years and the Insurance Company was not entitled to a license for a license year beginning after the effective date of the amendment increasing the gross premiums tax, without paying such increased tax for that year. 10

Hanover Fire Insurance Co. v. Harding, 272 U. S. 494, strongly relied on by counsel for the Insurance Company, is distinguishable from the instant case. In that case the Hanover Company conducted the business of fire insurance in the town of South Chicago, Cook County, Illinois, through agencies which it there maintained. A statute of the state of Illinois, adopted June 28, 1919 (Cahill's Ill. Rev. Stat. 1925, c. 73, \$79, p. 1390), provided that each nonresident corporation licensed and permitted to do an insurance business in Illinois should pay an annual state tax for the privilege of so doing, equal to two per cent of the gross amount of the premiums received during the preceding calendar year on contracts covering risks within Illinois. The Hanover Company regularly procured a license from the Department of Trade and Commerce in Illinois and annually paid the two per cent gross premiums tax.

Sec. 30 of the Fire and Marine Insurance Act of 1869, as amended, (Cahill's Ill. Rev. Stat. 1925, c. 73, §159, p. 1405)

in part reads:

"Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, [fol. 50] town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding

Note, 49 A. L. R., p. 751.

The question of the validity of the increase in the tax on gross premiums received between January 1, 1941, and April 25, 1941, is not raised and we express no opinion with respect thereto.

¹⁶ Philadelphia Fire Association v. New York, 119 U. S. 110, 119;

Manchester Fire Ins. Co. v. Herriott, C. C. Ia., 91 F. 711, 717-720:

British-American Mortg. Co. v. Jones, 77 S. C. 443, 58/ S. E. 417, 420;

year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes— . . . that other personal property is subject to at the place where located, . . ."

The General Revenue Act of Illinois, adopted in 1898 (Cahill's Rev. Stat. 1925, c. 120, §329, p. 2042), required personal property to be valued at its fair cash value and set down in one column headed "Full Value," and one-half thereof to be ascertained and set down in another column headed "Assessed Value." For the year 1923, and for many years prior thereto, by what was called an equalization, systematically and intentionally carried out, the amount set down in a column headed "Full Value" was not more than sixty per cent of the actual market value of the personal property returned, and the amount set down in the column headed "Assessed Value" was not more than thirty per cent of the market value. In a long line of decisions the Supreme Court of Illinois had held that the tax imposed by \$30, supra, on the net receipts was a tax on personal property.11 Accordingly, net receipts were treated as personal property and their assessment was by equalization and debasement reduced to thirty per cent of their full value. The Supreme Court of Illinois, in People v. Barrett, 309 Ill. 53, 139 N. E. 903, decided June 20, 1923, held that the tax under \$30 was an occupation tax and that the value of net receipts should not be reduced as in the assessment of personal property. The Hanover Company brought an action against the county treasurer and ex-officio tax collector of Cook County, in the Superior Court of Cook County, in which it prayed for an injunction to prevent the distraint of its property under a warrant for the collection of taxes alleged to be due under §30. The Superior Court denied the relief sought and the Supreme Court of Illinois affirmed.

[&]quot;Walker v. Springfield, 94 Ill. 364;

City of Chicago v. James, 114 Ill. 479;

Chicago v. Phoenix Insurance Company, 126 Ill. 276;

National Fire Insurance Company v. Hanberg, 215 Ill. 378;

People v. Cosmopolitan Fire Insurance Co., 246 Ill. 442:

[fol. 51] See Hanover Fire Insurance Co. v. Carr. 317 Ill. The case was taken by writ of error to the Supreme Court of the United States. That court held that the authority or license granted by the Department of Trade and Commerce under the Act of June 28, 1919, for which the Hanover Company paid two per cent of gross premiums received by it during the preceding year, put it upon a level with domestic insurance companies doing business of the same character; that compliance with \$30 was not a condition precedent to permission to do business in Illinois and that the state Supreme Court had so conceded: that the tax imposed under \$30 upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois was a heavy discrimination in favor of domestic insurance companies of the same class and was a denial of the equal protection of the laws, and that the state could not exact as a condition of the Hanover Company's engaging in business in Illinois, that rights secured to it by the Federal Constitution might be infringed. See Hanover Insurance Company v. Harding, 272 U.S. 494. In that case, the state, having exacted a gross premiums tax for the privilege of doing business in the state, undertook to impose, in addition thereto, an unconstitutional tax.

In the instant case, the state exacts the payment on or before the twenty-eighth day of February in each year ¹² of a valid privilege tax based on gross premiums for the privilege of doing business in Oklahoma during the license year expiring on that date and the payment of such valid tax as a condition precedent to the issuance of a license for the ensuing license year. The Supreme Court recognized in the Hanover Insurance Company Case that "at the end of the year for which the license has been granted, the State may in its discretion impose, as conditions precedent for a renewed license, past compliance with its valid laws." ¹³

We accordingly conclude that 36 O. S. 1941, § 104, does not violate the Fourteenth Amendment.

The judgment is, therefore, Affirmed.

¹² In leap years the 29th day of February.

¹³ Hanover Insurance Co. v. Harding, 272 U. S. 494, 514.

[fols. 52-71] IN UNITED STATES CIPCUIT COURT OF APPEALS

JUDGMENT-May 7, 1943

Twenty-sixth Day, March Term, Friday, May 7th, A. D. 1943. Before Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the franscript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by

counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed; and that Jess G. Read, Insurance Commissioner for State of Oklahoma, appellee, have and recover of and from Great Northern Life Insurance Company, a corporation, appellant, his costs herein.

Petition for rehearing covering 17 pages omitted from this print.

It was denied, and nothing more by order of June 9,

1943

[fols. 72-73] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING-June 9, 1943

This cause came on to be heard on the application of appellant for leave to file a petition for rehearing herein out of time and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said application be and the same is hereby granted and that the appellant be permitted to file twenty printed copies of a petition for rehearing in this cause instanter, which is accordingly done.

It is further ordered by the court that the said petition

be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTE RE ISSUANCE OF MANDATE

On June 21, 1943, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and

judgment of said court, was issued to the United States. District Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI-Filed October 11, 1943.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. Counsel are requested to discuss in their briefs and on oral argument the right of petitioner to maintain its suit in a federal court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Herbert R. Tews. File No. 47,728. U. S. Circuit Court of Appeals, Tenth Circuit, Term No. 235. Great Northern Life Insurance Company, Petitioner, vs. Jess G. Read, Insurance Commissioner for the State of Oklahoma. Petition for a writ of certiorari and exhibit thereto. Filed August 6, 1943. Term No. 235 O. T. 1943.